

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1083

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Plaintiff-Appellee

Docket No. 77-1083

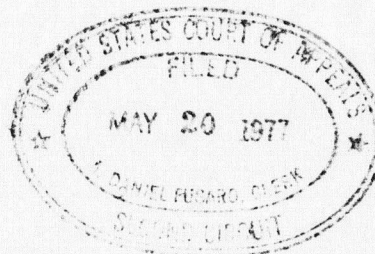
v.

CARMELLO SANSONE, a/k/a
"Michel",

Defendant

ORIGINAL

APPELLANT'S BRIEF



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Other Authorities:

- Del Costillo, "The Influence of Language Upon Symptomatology in Foreign-Born Patients",
American Journal of Psychiatry, 127: 242-244 (1970)
- Ennis, Bruce & Litwack, Thomas, "Psychiatry & the Presumption of Expertise: Flipping the Coins in the Courtroom", 62 Calif. L. Rev. 693, 724-726 (1974)
- A. Howard, Magna Carta - Text & Commentary, 43 (1963)
- Model Penal Code, Art. 11; Sec. 2.10 (Tent. Draft No. 9, 1959)
- Paul W. Williams, "The Defense of Entrapment & Related Problems in Criminal Prosecution",
28 Fordham Law Review 399, 417, 418 (1906)
- United States Constitution, Amendment VI

PRELIMINARY STATEMENT

Carmello Sansone appeals from a judgement of conviction entered on January 17, 1977 in the United States District Court for the Southern District of New York after a six and a half day trial before the Honorable Morris E. Lasker, United States District Judge, and a jury.

The indictment 76-CR-835 charged defendant Sansone with conspiracy to violate Title 21, U.S.C. Sections 812, 841 (a)(1), 841(b)(A), 846 (Count One) and with possession with intent to distribute a narcotic drug in violation of Title 21, U.S.C. Sections 812, 841(a)(1) and 841(b)(1)(B) and Title 18, U.S.C. Section 2 (Count Two).

Defendant's trial commenced on November 12, 1976 when the jury found defendant guilty on both counts.

On January 17, 1977 Judge Lasker sentenced Sansone to ten (10) years on Counts One and Two, the said sentences to run concurrently and not consecutively with the provision that the defendant shall serve a Special Parole Period of Six (6) years as a multiple felony offender.

STATEMENT OF FACTS

A. THE PROSECUTION'S CASE AGAINST DEFENDANT SANSONE

The first witness called by the prosecution, William Schnakenberg, testified that he was and is a special agent working with the Drug Enforcement Administration (DEA). Schnakenberg testified that on May 27th, 1976 he assisted in placing a Nagra recording device on "Hugo", a paid government informant ("Hugo" had spent fifteen (15) years in prison). (T-35, T-597) Schnakenberg elaborated "that the government would help bring to this country from Italy Hugo's two sons who were studying to be lawyers and were about to be drafted into the Italian army," (T-625) in exchange for the informant's cooperation in this case. However, on cross examination of DEA agent William McMullan he stated that on the night of May 27th, 1976, Hugo did not have a Nagra device on him. (T-320)

Schnakenberg testified that he was on duty May 28, 1976 in Rudy's Bar located at 44th Street and Ninth Avenue with other surveillance agents. However, he couldn't recall their names. (T-50) Schnakenberg alleged that after engaging in a brief conversation with "Hugo", the confidential informant left the bar and returned twenty (20) minutes later with a matchbook which he purportedly gave to Schnakenberg. (T-53. Schnakenberg did not see anyone hand this matchbook to the

informant. (T-146) Nor did any other person witness this matchbook being given to Hugo. Additionally, the matchbook was never tested for fingerprints. (T-196) The conversations concerning Hugo were not recorded because Hugo was not wired with a recording device. Schnakenberg testified that he tested the matchbook for cocaine in the bar and the test proved positive. (T-52)

On May 28, 1976 while Schnakenberg was still on duty in Rudy's bar, Hugo allegedly left the bar with \$20,000. Schnakenberg had given him to purchase cocaine. DEA Agent Michael Pavlick testified that he had the defendant under surveillance for four hours on May 28, 1977. (T-535) Agent Pavlick responded in the negative to the question asked on cross examination: "During that time, did you ever see Mr. Sansone give anything to Hugo, any contraband?" (T-535) He also answered "no" when asked: Did you ever see Mr. Sansone take money from Hugo?" (T-535)

DEA Agent Dennis Nargi, stated that he was on duty in the vicinity of 45th Street and 9th Avenue on the evening of May 28, 1977. (T-260) Nargi testified that he was driving in a government car when he saw Mr. Sansone and Mr. Fuentes having a conversation. However, Nargi was only able to observe them for a few seconds. (T-265) Nargi never reported his alleged observations and could not recall the time the purported

conversation took place. (T-275) On cross examination Nargi responded in the negative when asked: On the 28th day of May did you see Mr. Sansone exchange anything, be it contraband, money, or a matchbook with Hugo or any other person?" (T-279)

DEA William McMullan was on duty May 28, 1976, on 44th St. between 8th and 9th Avenues. (T-309) Agent McMullan testified that at approximately 6:45 p.m. on said date he saw Mr. Fuentes meet Mr. Sansone and the confidential informant "Hugo". (T-309) McMullan "thought" that Mr. Fuentes extended his right hand to Hugo and "appeared" to pass something to him but their hands never touched. (T-312, 313) During cross examination McMullan stated that when Hugo left Mr. Fuentes and Mr. Sansone, he did not observe Hugo put either of his hands in his pocket. (T-317) Also on cross examination it was noted that McMullan was on foot when he made his observations, a considerable distance from the purported individuals. His view was blocked by rush hour traffic, etc. and he was not utilizing binoculars. (T-325) Additionally, there were at least three lanes in between the two lanes for parked cars that separated him from Mr. Sansone, Mr. Fuentes, and Hugo. (T-325, 326) At this point, the court took judicial notice that 43rd Street and Ninth Avenue is next to the Lincoln Tunnel, and adjacent to the theater district. (T-333). In addition, that Friday, May 28th, was the first day of the Memorial Day weekend.

On cross examination, Agent Schnakenberg was asked when the first time the figure of \$20,000. was discussed? (T-178) He replied May 27th or May 28th, 1976. (T-179) Subsequently, during cross examination Mr. Schnakenberg's memory was "possibly refreshed" concerning discussions he had in regard to the figure of \$20,000. on or before May 27, 1976. Agent Schnakenberg answered that the figure \$20,000. was discussed, but "I don't know who it pertained to before the 27th." (T-197) Additionally, Agent Pavlick, who also worked with the confidential informant Hugo during this investigation responded on cross examination that the \$20,000. figure might have been discussed prior to May 27, 1976. (T-516)

Agent Schnakenberg stated that on June 1, 1976 while he was on duty at his headquarters on 57th Street, technicians put a Kel transmitter in a government undercover vehicle and also a Nagra recorder in a government undercover car. (T-77) Agent Schnakenberg testified that a Kel transmits but it does not record. (T-77) It usually transmits to a recorder which is a short distance away, but the device itself only transmits. (T-77) At approximately 4 p.m. surveillance agents and the secret informant, Hugo, driving the undercover vehicle left 57th Street. (T-78) Hugo was allegedly given \$20,000. to purchase drugs by the DEA. (T-78)

DEA Agent Pavlick, who was part of the investigation from its beginning (T-486) testified that he was on duty

June 1, 1976 and that he was trailing the vehicle driven by Hugo. However, he did not know if the informant had \$20,000. with him. (T-544) During cross examination Mr. Pavlick stated that "the Kel was transmitting to his receiver - whether it was taped or not he didn't know." "He knew the Nagra came out." (T-492) Later in the trial it was stipulated that the Nagra recorder was malfunctioning on June 1, 1976. (T-653, 654) Also on cross examination Pavlick responded in the affirmative when asked if he lost sight of Hugo while trailing his undercover vehicle. (T-495) Pavlick replied in the affirmative when questioned whether the broadcast became inaudible at times. (T-495) Hugo was the only person allegedly who experienced no inaudible periods.

The Agent Schnakenberg testified that on June 4, 1976, Hugo phoned him at his headquarters. (T-113) After the call Schnakenberg allegedly took the same \$20,000. whose serial numbers had been recorded to the Market Diner located at 43rd Street and 11th Avenue. (T-113) Here, Schnakenberg stated he met Hugo and Mr. Sansone and allegedly asked Mr. Sansone if he wanted the \$20,000. now? (T-113) However, the conversation was not recorded (T-114) and Hugo, the government informant, was never produced in court to testify and his address and whereabouts are allegedly not available at this time. On cross examination it was noted that Schnakenberg sat directly across the table from Mr. Sansone, while acting

in an undercover capacity to obtain cocaine, but Schnakenberg never gave the \$20,000. to Mr. Sansone. (T-204) On cross examination Schnakenberg indicated Mr. Sansone did not wish to touch the stack of \$100. bills which comprised the \$20,000. (T-231) Schnakenberg testified that after finishing their meal Hugo and Mr. Sansone left the diner without Schnakenberg. (T-116) Hugo supposedly arrived back to the diner two hours later alone carrying a package that was said to contain cocaine and \$1,300. (T-116) The purported package that was received from Hugo was never checked for fingerprints. (T-204) The \$1,300. was never checked for prints either. (T-204)

Schnakenberg testified that on June 16, 1976 at approximately 10:00 a.m. while on duty, he met Mr. Sansone at the Market Diner located at 43rd Street and 11th Avenue. (T-134) Schnakenberg testified that he negotiated with Mr. Sansone for cocaine and that Sansone purportedly stated that the price had now gone up to \$40,000. a kilo. (T-134) However, on cross examination it was uncovered that although Mr. Schnakenberg filled out his routine report for this date, there was no mention of the supposed negotiation between himself and Mr. Sansone for the purchase of \$40,000. of cocaine in said DEA report!! (T-191)

DEA Agent Schnakenberg testified that he was on duty

June 16, 1976, and drove to the Market Diner where he met Mr. Sansone. (T-135) Schnakenberg testified that Mr. Sansone joined him in his undercover vehicle, a brand new Mercedes sports car, and Schnakenberg then proceeded to drive to 108th Street and Riverside Drive. (T-136) Mr. Schnakenberg then stated that Mr. Sansone left and returned 45 minutes later with a small package. (T-136) However, at this time Undercover Agent Schnakenberg was not wired with either a Kel transmitter or a Nagra recorder. (T-191) Mr. Schnakenberg was under surveillance by other agents from his group at this time, (T-135) but on cross examination he said that he did not know if anyone witnessed the alleged transfer from Mr. Sansone on June 18, 1976. (T-200) On cross examination Schnakenberg replied that there was no photo of the "transfer" even though he was supposedly under surveillance at that time. (T-199, 200)

Frank Morello testified as a government witness. He stated that he owned the building with the address of 357 West 43rd Street, and testified that Mr. Sansone rented an apartment in his building. (T-291) During the trial the government offered photographs placing Mr. Sansone near this building, and next to Rudy's bar which was in walking distance of said apartment.

DEA Agent Pavlick testified that he was on duty at

approximately 3:20 p.m. August 18, 1976. (T-459) Agent Pavlick stated that at this time he arrested Mr. Sansone and advised him of his constitutional rights as per Form DEA 13-A. (T-460) "Mr. Sansone told me he understood his rights and that he wanted to know the extent of the investigation we had on him so he could show us that we were mistaken." (T-460)

Subsequent to Mr. Sansone being processed and fingerprinted at 57th Street on August 18, 1976, Pavlick testified that he asked Mr. Sansone if he ever dealt in narcotics with Special Agent Schnakenberg? (T-463) Pavlick stated Mr. Sansone "said he did not know Mr. Schnakenberg" (T-463) It should be noted that Schnakenberg testified that he used an alias when he worked undercover in May and June, 1976.

B. THE DEFENSE CASE

Defense counsel called Tamara Nawi, (T751) a professional interpreter who responded affirmatively when asked: "Did you make any changes on the transcript that was afforded to you by the government, Exhibit J?" (T-754)

POINT ONE

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT
OF CONFRONTATION AND A FAIR TRIAL

- A. The defendant's constitutional right of confrontation was effectively denied by the District Court.

The law is clear that in a criminal trial the evidence developed against a defendant must be elicited from witnesses in a courtroom where there is judicial scrutiny of the accused's right of confrontation and cross examination. Turner v. Louisiana, 379 U.S. 466, 472 (1965); Pointer v. Texas, 380 U. S. 400 (1965); U. S. Const. amend. VI.

The right of confrontation was deemed to be of such importance that it was included in the Magna Carta in 1215. A. Howard, Magna Carta - Text and Commentary, 43 (1963). The language used by Lord Strafford in his impeachment plea of 1680 dramatizes the importance of one's right to confront and cross examine his accuser:

I beg your honor that he (the witness Dugdalc) may look me in the face, and give his evidence as the law is...I desire the letter of the law which says my accuser shall come face to face. ⁷ Howell's State Trials, 1293. (Corbetts ed. 1810).

The defendants in the instant case have been denied their constitutional right to confront their accuser. Count two of the indictment charges that on June 4, 1976, the defendants "unlawfully, wilfully and knowingly...distributed cocaine. (App.C-1). The judge indicated to the jury that they must solely use events and acts that occurred on June 4, 1976 to determine if the defendants were innocent or guilty. (T-899) On June 4, 1976, Hugo, the "confidential

informant" purportedly gave Mr. Sansone \$20,000. and received a package containing cocaine and \$1,300. (T-116) which he delivered to a government agent. (T-116) No one but the confidential informant allegedly witnessed this transaction. Additionally, the alleged package that was received from Hugo was never checked for fingerprints. (T-204) Nor was the \$1,300. examined for prints even though the serial numbers of the bills had previously been recorded. In addition, the confidential informant was not "wired" on June 4, 1976. (T-114) Consequently, the purported conversation was allegedly only communicated to the confidential informant.

Count one of the indictment charges the defendants with "unlawfully, intentionally and knowingly conspiring and agreeing..." (App.C-2) Only the confidential informant had the requisite knowledge to adequately testify to determine whether the defendants "intentionally and knowingly and unequivacably conspired and agreed." (App.C-2) The Supreme Court has held that the right of confrontation and cross examination are among the fundamental requirements of a constitutionally fair trial. Kirby v. United States, 174 U. S. 47, 55 (1899); Pointer v. Texas, supra. In the instant case the confidential informant was the one individual who could offer the defendants any viable opportunity to satisfy these "requirements".

The Assistant United States Attorney who tried this case attempted to minimize the critical issue of the "confidential informant's" credibility by asserting that the government had not relied on the credibility of Hugo to prove their case when he declared:

I want to make it absolutely clear that the Government has not relied in this case upon the credibility of Hugo. He has not testified in this case, his credibility has not been questioned or tested. Nothing from his mouth has been offered for the purpose of proving that what he said was true. (T-794)

The Assistant United States Attorney's position is clearly untenable in light of both counts in the indictment which establish Hugo as the nexus of the government's charges, and is inconsistent with the District Court statements pertaining to the credibility of the confidential informant, Hugo and the tape recording. (T-568) Judge Lasker indicated that:

If I have got it straight, Hugo came back in and gave the matchbook to Schnakenberg and presumably he implied that this came from Sansone. So to that extent, he in a sense is testifying by his actions and that is an example...I can't accept the fact that the personality of Hugo is entirely, as you put it, is inapposite here.

The "said" tape recordings which were admitted into evidence over defense counsel's motion for a directed verdict and/or a mistrial (T-700,-703) further cut on the credibility of Hugo in view of DEA agent Pavlick's statements (T-495). Agent Pavlick testified that the broadcasts became inaudible at times. (T-405) Additionally, he stated he lost sight of Hugo's vehicle while trailing him which meant that Hugo was the only

person who was privy to the purported conversations. (T-495)
The Supreme Court in Roviaro v. United States, 353 U.S. 53.
64 (1957) discussed the use of tape recordings against the
defendant analogously to the facts in the instant case by
stating:

The government's use against petitioner of his conversation with John Doe while riding in Doe's car particularly emphasizes the unfairness of the nondisclosure in this case. The only person, other than petitioner himself, who could controvert, explain or amplify Bryson's report of this important conversation was John Doe. Id.

Extrapolating from said language and reasoning of Roviaro, supra, appellant submits that the logical conclusion this court must accept is that in trials where tapes are played and a confidential informant is not produced by the government, the defendant's constitutional rights, under the 6th amendment, specifically his right to confrontation, have been so precluded as to necessitate the ordering of a new trial and/or the dismissal of the indictment and/or the ordering of a hearing in the District Court to determine on the specific issues whether or not the defendant was properly afforded his rights under the circumstances.

In Mattox v. United States 156 U.S. 237, 242 (1895), the Supreme Court provided standards by which one can measure a petitioner's confrontation clause claim:

"The primary object of the constitutional provision

in question was to prevent dispositions on ex parte affidavits such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross examination of the witness, in which the accused has an opportunity, not only to testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Defendant respectfully submits that for all the above-mentioned reasons, his sixth amendment right of confrontation was denied, requiring a new trial, dismissal of the instant indictment and/or the ordering of a hearing on the issue in the District Court.

- B. The trial court's handling of petitioner's motion for a mistrial and motion for production of the confidential informant, coupled with the government's "surprise" and failure to exercise reasonable diligence in locating said informant was highly prejudicial and entitles the defendant to a new trial.

In United States v. Fisher, 531 F.2d 783, 787 (5th Cir., 1976), the Fifth Circuit enunciated guidelines to determine when an informant's participation in the charged crimes was so great that fairness to the appellant "would require disclosure and production of the informant regardless of any showing the government could make in opposition." Id., at 788. The court, in a clarifying discussion of the law, stated that at one end of the continuum are cases where the informant only provides the government with a tip or a lead. Id. at 789

citing Bourbois v. United States, 530 F. 2d 3 (5th Cir.1976) It the opposite end of the spectrum are cases

"in which an informer has played a crucial role in the alleged criminal transaction, and disclosure and production of the informer are required to insure a fair trial." United States v. Fisher, supra, at 789.

In the latter cases the court held the government has a duty to produce the informant. Id, at 789.

In the present case, the informer is clearly more than "a mere tipster." In fact, the confidential informant is the nexus of the government's charged crimes. He is the singular link to the petitioners in this case.

In United States v. Ortega, 471 F.2d 1350, 1358 (2nd Cir., 1972) the Second Circuit Court concluded there was no error concerning the identification or the production of the confidential government informant. Id at 1357. The Ortega panel distinguishing Rovario stated:

this is not a case where a government undercover agent plays an active part in the carrying out of the transaction that is charged in the indictment against the defendant as was the case in Rovario, supra at 357.

In the case at bar, the informant is completely intertwined with the indictment as to make a logical separation of the two impossible. Where an informant plays such a critical role, the language used in U. S. v. Fisher, supra, requires both disclosure and production from the government to insure a fair trial. The court did not use the disjunctive "or" to

join disclosure and production. On the contrary, they specifically employed the conjunctive "and" to articulate the duty of the government. Id., at 789.

In United States v. Super, 492 F.2d 319 (2nd Cir., 1974), a case involving the production of a confidential government informant, the appellants were convicted of conspiracy to possess with intent to distribute...heroin. Id., at 320 The government's case was based principally on the testimony of an undercover police officer, and a co-defendant who pleaded guilty and testified for the government. Super, supra at 320. The court concluded that the government had exercised reasonable diligence in its search for the confidential employee in order to produce him at the trial. Super, supra at 321 However, the facts in the instant case are clearly distinguishable. In the present case, defense counsel made a pretrial motion for the disclosure of the identify of the government witnesses that the government would call to testify at trial. Pursuant to the District Court's order, the witness list (App.E-1) was received on November 7, 1976, consistent with U. S. v. Cannone, 528 F.2d 296, 298 (2nd Cir., 1975). The confidential informant named Hugo was on this list provided by the United States Assistant District Attorney. (App.E-1)

Defense counsel in contrast to Super, supra, was not alerted that the confidential informant would not be produced

or called as a witness by the government - the antithesis occurred. Defense counsel, relying on the said witness list (App.E-1) which had been provided by the United States Assistant District Attorney at the "eleventh hour" asserted in his opening statement that:

Mr. Carey tried to tell you about Bill and Hugo. You are going to find out, I believe, that Hugo is a man of ill repute. Hugo is a man that knows about narcotics because he has been in trouble before. That is what I believe. I believe that is going to come out. In fact, I think Mr. Carey is going to bring it out. (T-20, 21)

Clearly, the language: "I believe that Mr. Carey will bring it out" (T-21) demonstrates that for all intents and purposes, defense counsel relied on the list. Counsel believed that Mr. Carey would call Hugo as a "star" witness and bring out those facts in the best tradition of prosecutors regarding the bad character of its star witness, Hugo, before the defense counsel could effectively impeach the credibility of the witness (informant).

If Hugo was not called as a witness by the government, defense counsel intended to call the confidential informant as the crucial witness in the defendant's case. This was defense counsel's strategy - he prepared his defense accordingly, confident that the informant would be called as a witness. However, defense counsel received the overwhelming surprise that Hugo would not appear at the trial on November 16, (T-582) after he had prepared his defense, opened to the jury,

and had cross examined government witnesses, etc.

The timing of the government's communication to defense counsel concerning Hugo's availability was clearly more disruptive than in United States v. Jones, 492 F.2d 239, 241 (3rd Cir., 1974). In Jones, supra, the Court criticized the government for failing to notify the defense that it did not plan to call the informant as a witness, until the day the jury was selected. Id., at 241 The court stated:

The failure of the government to undertake a serious search for the informant in advance of the date set for the trial has not been explained, and hence in the circumstances here we do not consider that the obligation to produce the witness has been met. Id., at 242.

In the instant case the witness list (App.E-1) was given to the defense counsel on November 7, 1976, two days after the trial was originally scheduled to begin. (The trial had been delayed by the prosecution and not the defense. The prosecutor had not prepared the transcripts of the tapes and/or the translations of the tapes as he had been ordered to do by the District Court Judge prior to the trial.) Subsequent to November 7, 1976, defense counsel understandably relied on the government's witness list (App.E-1) in his trial preparation to his client's detriment.

In United States v. Super, supra, the defense did not attempt to question the prosecutor away from the jury as to

what efforts had been made to locate the informant. Id., at 321 But, the case at bar is distinguishable, because defense counsel vehemently objected to the non-production of the confidential informant and properly demanded to know what procedures were initiated by the government in order to locate Hugo (T-505, 703, 864) and moved for a mistrial.

Super, supra, is distinguished from the instant case in that there was no co-defendant who testified on behalf of the government. Instead, tapes of purported conversations, allegedly involving the defendants and the confidential informant were produced and played in front of the jury over defense counsel's objection. Defense counsel moved for a directed verdict and moved that the tapes should not be admitted into evidence. (T-700) The language in United States v. Jones, supra, at 241 is clearly applicable to the case at bar:

Although we recognize that constructive possession may be shown by circumstantial evidence...the government's evidence does demonstrate the importance of the informant's knowledge and underlines our concern that the prosecution did not make him available for trial. Id., at 241

In the present instance, counsel does not take exception to the general proposition discussed by the learned justices in United States v. Super, supra, that drug informants can voluntarily journey to remote places. Id. However, the trial transcript, (T-505) and the government's potential witness list which was furnished to defense counsel two days

before the trial, (App. E-1) clearly leads one to the unequivocal conclusion that no real "good faith" effort was ever made by the government to locate Hugo. This conclusion is reinforced by the fact that the government had consummated a "deal" with Hugo to obtain his participation in the present investigation. (T-625) The terms of the deal were: That the government would try to obtain admittance in an Italian law school for Hugo's sons. (T-623) When an individual completes his part of a bargain, he would expect to receive the consideration he bargained for. Hugo expected to be paid for his services. He had a bargain with the government. Suddenly he disappeared! In Velarde-Villareal v. United States 354 F. 2d 9, 13 (9th Cir. 1965) in a similar fact situation concerning an informant, the court remanded the cause to the trial court to permit the government to show if it had performed it's duty to expend every reasonable effort to produce the informer at trial. Id.; United States v. Leon, 487 F.2d 389, 392 (9th Cir. 1973).

In United States v. Jones, supra at 242, the justices stated that since the failure of the government to initiate a concerted effort in advance of the date set for trial has not been explained, the government's obligation to produce the witness has not been met. Id. The court elaborated stating:

The valuable contribution made to society by the difficult and dangerous work of the narcotics

agent can't be dilluted by a conviction obtained by other than a fair trial. Id. at 243.

It is respectfully submitted that the court committed reversible error by not requiring the government to produce the confidential informant, requiring a new trial or a hearing to afford the government an opportunity to disclose the efforts it made to locate the "paid" informant.

POINT TWO

THE FAILURE OF THE GOVERNMENT TO PRODUCE THE INFORMANT WHO IS CRUCIAL TO THE DEFENDANT'S ENTRAPMENT DEFENSE DENIED THE DEFENDANT A FAIR TRIAL REQUIRING A NEW TRIAL AND/OR A HEARING WHERE THE GOVERNMENT WOULD HAVE AN OPPORTUNITY TO PROVE THAT IT HAD EXERCISED REASONABLE EFFORTS TO PRODUCE THE INFORMANT

In the instant case DEA agent Schnakenberg testified that he initially discussed the figure of \$20,000. with Hugo on May 28, 1976. (T-178) However, on cross-examination, defense counsel brought out that DEA agent Schnakenberg may have discussed the said \$20,000. figure on an earlier date. (T-197) This narrative is patently inconsistent with the government's position that the defendant negotiated with Hugo for the purchase of cocaine for \$20,000. on June 1, 1976. (T-6) In fact, the government had created the \$20,000. figure before May 28, 1976 and vouchered the money out on that date with the expectation of suggesting the \$20,000. figure to the defendant in an effort to entrap him. It is respectfully submitted that this conduct by the government was so outrageous that due process principles absolutely barred the government from prosecuting the defendant. Rochin v. California, 342 US 165 (1952).

In a provocative discussion on police standards in entrapment cases, Paul W. Williams in The Defense of Entrapment and Related Problems in Criminal Prosecution, 28 Fordham Law Review, 399, 417, 418 (1906) stated:

"The test should not be that of the supposed intention of Congress or of the creative activity of the agent,

but whether police conduct falls below the proper standard for the exercise of governmental power. This itself, of course, is not an absolute standard or one susceptible of easy definition. It must necessarily differ in each case. What is quite clear is that while the use of government informants is not improper, nor is it improper for government agents to practice deceit and pretense in affording an opportunity for the commission of crime, the ultimate goal of the permitted police activity is only to reveal criminal design, and not to employ 'methods of persuasion' or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it. Id., at 418 citing the Model Penal Code, Art. 11, Sec. 2.10 (Tent. Draft. No. 9, 1959).

In the present case the police activity did not reveal a "criminal design". On the contrary, the government implanted "criminal design" by use of a carefully developed scheme. There was no indication that the defendant suggested the figure of \$20,000.

In United States v. Super, 492 F.2d, 319, 322, (2nd. Cir., 1974), the court concluded that the informant's testimony was not crucial to establish entrapment. Id. at 322. However, in the instant case the confidential informant, Hugo, purportedly negotiated with the defendant for the purchase of cocaine for \$20,000. on June 1, 1976. (T-6, 811) However, the alleged conversation was never recorded. (T-653) Consequently, one does not know if the purported conversation ever took place. In addition, there is no way of evaluating the tone and the circumstances surrounding the "alleged" conversation.

In Vilarde-Villareal v. United States, 354 F.2d, 9, 13

(9th Circuit, 1965) the court commented that:

"the practice of the government in employing agent informants in narcotics cases is well known. We also know that such agents are usually not trained officers and often they are themselves addicts or former addicts. The government must know that an eager informant is exposed to temptations to produce as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well.

The court stated that

"the case should be remanded to the trial court for the purpose of holding a further hearing at which the government usually be given the opportunity of proving, if such be the case, that it was genuinely unable through reasonable efforts to produce the informant. Id., United States v. Leon, 487 F.2d 389, 392 (9th Circuit, 1973).

It is respectfully submitted that Hugo entrapped the defendant and that his evidence was therefore crucial to the establishment of a defense requiring a new trial and/or a hearing in which the government would have an opportunity to demonstrate that they exercised reasonable means to produce the confidential informant.

POINT THREE

THE TAPE RECORDINGS INVOLVING THE INFORMANT AND THE DEFENDANT SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE

In the case at bar the tape recordings involving the confidential informant, Hugo, and the defendant should not have been admitted into evidence because consent of one of the parties was not obtained consistent with United States v. Kaufer, 406 F.2d 550, 551 (2nd Cir., 1969). In Kaufer, supra, at 551, the Kaufer court justified the procedure utilized by stating:

"The procedure used against Kaufer involved the recording of a conversation with the consent of one of the parties of that conversation." Id.

However, Kaufer is clearly distinguishable from the instant facts. The consent of the informant was not obtained by the government in contrast to Kaufer, supra at 551 where the informant clearly consented as brought out by his testimony at trial in regard to the tapes. Thus, employing the reasoning of the Second Circuit in Kaufer, the key tapes involving Hugo and the defendant should not have been admitted into evidence over vigorous objection by defense counsel. (T-700) In the present case the informant failed to testify at trial and/or at any hearing on this issue.

It is respectfully submitted that the trial judge committed a prejudicial error by admitting the said "tapes" into evidence requiring a new trial.

POINT FOUR

THE CONSTITUTIONAL RIGHTS OF DEFENDANT WERE VIOLATED WHEN HE WAS EXAMINED BY A PSYCHIATRIST WHO DID NOT SPEAK HIS NATIVE TONGUE ON THE ISSUE OF THE DEFENDANT'S COMPETENCY

Pursuant to a court order, dated December 2, 1976, (see appendix p.G 1) the Honorable Judge Lasker appointed Dr. Stanley L. Portnow to examine the defendant and determine his competency to stand trial, be sentenced and assist in his own defense. On December 24, 1976, Dr. Portnow issued his report (see appendix p.H 1) which found that defendant had "adequate knowledge and appreciation of the charges which confront him and can confer with counsel in his own defense." (See appendix, page H1)

The defendant's first two languages were Italian and French, respectively. Throughout the trial, defendant was aided by an Italian-speaking interpreter. However, Dr. Portnow's psychiatric examination was conducted in English without the aid of an interpreter. Dr. Portnow admitted in his report that there was a communication problem with defendant caused in part by language problems. (Appendix, p.H.1) Defense counsel objected to the manner in which the psychiatric examination was conducted (see letter dated December 30, 1976, appendix p.H.1).

Defendant respectfully submits that he was deprived of his rights under the Equal Protection Clause and Due Process Clause of the Fifth Amendment because an Italian or French

speaking psychiatrist was not appointed for the Competency Examination. Defendant was not contending that he had a right to an interpreter during the examination (See, United States v. Desist, 384 F.2d 889, 901-903 (2nd Cir., 1967); Aff'd, 394 U.S. 244 (1969)). Carmello Sansone asserted in his motion (See appendix, p.F-1) that the particular nature of the psychiatric interview (See, Rollerson v. United States, 343 F.2d 269, 274-276 (D.C. Cir., 1964), required an examination by an Italian or French speaking psychiatrist.

Failure to observe procedures
adequate to protect a defendant's
right not to be tried or convicted
while incompetent to stand trial
deprives him of his due process
right to a fair trial.
Drope v. Missouri, 420 U.S. 162,
172, 43 L.Ed 2d 103, 113 (1975);
Pate v. Robinson, 383 U.S. 375
(1966).

The importance of understanding a patient's cultural and language background in determining whether mental problems exist cannot be underestimated (See, Del Castillo, The Influence of Language Upon Symptomatology in Foreign-Born Patients, American Journal of Psychiatry, 127: 242-244 (1970). (See Exhibit A attached to affidavit of Stuart Shaw) Del Castillo described several clinical experiences in which Spanish-speaking patients appeared obviously psychotic during native-tongue interviews but seemed much less so, and even without any overt psychotic symptoms, when the interview was conducted in English. In this latter report, the interviews were part of pretrial examinations.

(Id.) There is considerable evidence that psychiatric judgments are strongly influenced by the socioeconomic backgrounds of the doctor and his patient. (See, Ennis, Bruce and Litwack, Thomas, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693, 724-726 (1974).

Analogous to the case at Bar is Morales v. Turman, 383 F. Supp. 53 (E.D. Texas, 1974). In that case, the court established standards of treatment for detecting mental retardation in juvenile delinquents incarcerated in reformatories. The court stated that a juvenile had a "right to treatment" requiring "minimal professional standards", such as

- 1) Normal IQ and achievement tests (both verbal and non-verbal) must be utilized, with special emphasis on tests which are appropriate for the student's background.
- 2) Examiners who are familiar with the background of the student and language must be a part of the staff. Id., at 82-90 (emphasis added)

Dr. Marie Fleetwood, Assistant Professor of Psychiatry has taught medical students, residents, psychiatrists, social workers, and psychologists over the past twenty-five years. While testifying in the trial of United States v. Rios, Ind. #73 Cr 1012 (E.D.N.Y., 1974), Dr. Fleetwood expressed her professional opinion on the use of interpreters during psychiatric examinations:

Q: Have you talked to any of the residents, the hundred residents that have studied under you to do a psychiatric examination through an interpreter?

Mr. Katzberg: Objection

Court: Overruled. You may answer whether you ever instructed on how to conduct a psychiatric examination through an interpreter.

The Witness: I really don't recommend it. Or if it is not possible, to use three or four different interpreters. Because, you see, you have to deal with the personality of the interpreter and the patient. And it is very difficult. They may - they would have to use two or three different interpreters. We get some facts about reality.

Q. Have you ever interviewed anyone in any other language besides English and Spanish?

A: Well, I took a little French and Italian.

A: You have diagnosed people in those languages, too?

A: Um-hm.

A: But you wouldn't venture to diagnose anybody in any other language? You would have to have the psychiatrist spoke that language?

A: Right.

Q: That would be the best technique?

A: Yes. Everybody would also agree.

Q: Is this the advice you would give your students?

A: Yes.

Q: The doctors that are studying under you?

A: That is part of the reason that there are so many people that are learning Spanish now.

Q: You mean, so many - are you talking about doctors?

A: Doctors, social workers, psychiatrists.

(Trial transcript, 363-366)

There appear to be no cases directly on point. However, precedents are not necessary to emphasize the prejudice that Carmello Sansone suffered when he was not allowed to be examined by an Italian or French speaking psychiatrist. It is respectfully submitted that only an Italian or French speaking psychiatrist could have made a truly accurate examination on this critical issue of competency. Defendant further contends that the use of interpreters to aid in the determination of competency was not an acceptable substitute. The use of an interpreter is another barrier to communication that can only interfere with arriving at an accurate diagnosis.

It is reasonable to infer that if indigent Carmelo Sansone would have been permitted to choose a psychiatrist, his selection would have been able to communicate in his native language, Italian.

The test of mental competency under 18 U.S.C.A. Sec. 4244 is whether a defendant has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and whether he has a rational and factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 401 (1960); Drops v. Missouri, 420 U.S. 162, 43 L. Ed. 103, (1975) (No. 73-6038). 18 U.S.C.A.

clearly states that upon a motion to determine competency

. . . the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist. (emphasis added)

Defendant contends that the statute was not complied with because an Italian or French speaking psychiatrist was not appointed. In this case, it is respectfully submitted that a "qualified" psychiatrist means one who could have examined the defendant in Italian or French.

CONCLUSION

For all the aforementioned reasons, the judgment of conviction in the trial below should be reversed, and the indictment dismissed, or, in the alternative, a new trial should be ordered.

Respectfully submitted,

STUART R. SHAW
Attorney for Defendant-
Appellant Sansone
600 Madison Avenue
New York, N. Y. 10022

**COURT OF APPEALS
SECOND CIRCUIT**

**UNITED STATES OF AMERICA,
Plaintiff-Appellee**

- against -

**CARMELLO SANSONE, a/k/a
"Michel",
Defendant**

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the 20th day of May, 19 77 at U.S. 1 St. Andrews Plaza
New York, N.Y.

deponent served the annexed Brin upon
Robert Fiske
U.S. Atty-So. Dist.

the 2 in this action by delivering 2 true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 20th
day of May, 19 77

Robert T. Brin

Reuben A. Shearer

Reuben A. Shearer

ROBERT T. BRIN
NOTARY U.S.C. State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1979

